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No. 89-

IN THE

# Supreme Court of the United States

OCTOBER, 1989

MICHAEL GATTO, RICHARD GATTO, STANFORD J. HELLER, LAURENCE KRAMER, RALPH NAPPI, NAT SORKIN, SAM ZUCKERMAN, SANDY ZUCKERMAN, HYMAN SILKES, LEFF & WOLF CO., a New York unincorporated association, and O. GEORGE PHILIPP,

*Petitioners,*

v.

MERIDIAN MEDICAL ASSOCIATES, INC., 1680 MERIDIAN CORP., MAST PROPERTY INVESTORS, INC. CONSOLIDATED MAST CORPORATION, MAST PROPERTY INVESTORS, INC. and AFFILIATED COMPANIES EMPLOYEE PROFIT SHARING TRUST. NWN CAPITAL LTD., MARKS, SHRON & COMPANY, NORMAN W. NICK, MARVIN E. GREENFIELD, GERALD SILVERMAN, JOHN DOE and RICHARD ROE INC.

*Respondents.*

## PETITION AND APPENDIX FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## QUESTION PRESENTED

Is the one year/three year limitations period adopted by the Third Circuit Court of Appeals in the *en banc* decision entitled *In re Data Access Systems Litigation* and applied in this case consistent *either* with the policy considerations that have led federal courts to uphold a private right of action under SEC Rule 10b-5 *or* the intent of Congress to provide an express remedy for fraud in securities contracts under Section 29(b) of the Securities Exchange Act of 1934?

## PARTIES

Petitioners — plaintiffs-appellants below — are identified as follows: Michael Gatto; Richard Gatto; Stanford J. Heller; Laurence Kramer; Ralph Nappi; Nat Sorkin; Sam Zuckerman; Hyman Silkes; Leff & Wolf Co., a New York unincorporated association; and O. George Philipp.

Respondents — defendants-appellees below — are identified as follows: Meridian Medical Associates, Inc., a Florida corporation; 1680 Meridian Corp., a Florida corporation; Mast Property Investors, Inc., a New York corporation; Consolidated Mast Corporation, a New York corporation; Mast Property Investors, Inc. and Affiliated Companies Employee Profit Sharing Trust, a New York business trust; NWN Capital Ltd., a New York corporation; Marks, Shron & Company, a New York general partnership; Norman W. Nick; Marvin E. Greenfield; and Gerald Silverman.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

MICHAEL GATTO, *ET AL.*,

*Petitioners,*

v.

MERIDIAN MEDICAL ASSOCIATES, INC., *ET AL.*,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners Michael Gatto, *et al.* respectfully pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Third Circuit.

## OPINIONS BELOW

The August 24, 1989 decision of the Third Circuit Court of Appeals dismissing the petitioners' amended complaint on statute of limitations grounds is reported at 882 F.2d 840 and, in its slip opinion version, is reproduced as Appendix A to this petition. The February 8, 1989 opinion of the District Court affirmed by the Third Circuit is not reported, and is reproduced as Appendix B to this petition.

## JURISDICTION

The Third Circuit decision that upheld the statute of limitations dismissal of the petitioners' amended complaint was entered on August 29, 1989. An extension of time to file this petition until December 22, 1989 was granted on November 20, 1989 pursuant to an order of Associate Justice William J. Brennan, Jr. This Court has jurisdiction to review the judgment of the circuit court by way of granting an application for a writ of certiorari pursuant to 28 U.S.C. § 2101(c).

## STAUTES AND REGULATIONS INVOLVED IN THIS CASE

Sections 10(b) and 29(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §§ 78j(b) and 78cc(b), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5, all of which are reproduced in Appendix D to this petition.

## STATEMENT OF THE CASE

### A. Factual Background:

Petitioners Michael Gatto, *et al.* commenced this action several months before the Third Circuit Court of Appeals established its one year discovery/three year absolute bar limitations period for SEC Rule 10b-5 actions in the case entitled *In re Data Access Systems Securities Litigation*, 843 F.2d 1537 (3rd Cir. 1988) (*en banc*), *cert. denied sub nom., Vitiello v. I. Kahlowsky & Co.*, 102 L.Ed.2d 103 (1988).

The essential relief sought by petitioners is rescission of contracts entered into on or about December 30, 1981 whereby they had agreed to purchase securities in the form of limited partnership interests in Meridian Associates, Ltd. ("Meridian Associates"), a Florida limited partnership organized for the purpose of owning and operating a medical

office building located in Miami Beach, Florida ("the Meridian building"). The securities were offered and sold to petitioners and other persons on the basis that the Meridian building had a fair market value of $4,200,000 and thus would generate substantial tax deductions through depreciation writeoffs. The securities contracts at issue were closed on December 30, 1981. Appendix A at 3.

Nearly five years later, the Internal Revenue Service ("IRS") determined in a 1986 report that the true market value of the Meridian Associates building in 1981 had been $2,300,000 or forty-five (45%) percent less than had been represented to the petitioners. The IRS thereafter notified the limited partners of Meridian Associates that it had disallowed tax deductions taken on their federal tax returns reflecting depreciation on the Meridian building. Appendix B at 4.

As duly noted by Circuit Judge Sloviter in the opinion of the court below: "Because [the petitioners] did not know the significant operative facts underlying their cause of action, particularly that the IRS would disallow the deductions, until after the three year absolute bar period of *Data Access* had passed, they could not possibly have relied on a longer statute of limitations period." Appendix A at 8. On December 18, 1987, the petitioners sued the controlling parties of Meridian Associates and several other persons responsible for determining the value of the Meridian building involved in the offer and sale of the securities contracts sought to be rescinded.

**B. Proceedings Below:**

The district court granted the respondents' motions to dismiss the petitioners' complaint holding that the federal securities claims alleged were barred by the limitations bar ruling announced by the Third Circuit in *Data Access* for Rule 10b-5 actions and applied the ruling retroactively. On appeal, the Third Circuit noted that the issue of whether the

*Data Access* limitations period for Section 10(b) and Rule 10b-5 violations was to be applied to rescission claims brought under Section 29(b) of the Exchange Act was one for which "there appears to be no precedent." Appendix B at 6.

The court below then proceeded to reject the petitioners' contention that Section 29(b) claims should be governed by the limitations period for contracts under traditional conflict of laws concepts. Instead, as it did with respect to Rule 10b-5 actions generally in *Data Access*, the Third Circuit found that "Congress used a clear pattern within the provisions of the Securities Exchange Act to require suit to be brought within one year of discovery and within three years after the occurrence of the violation." Appendix B at 7. Based on this finding, it retroactively applied the one year/three year limitations period as a matter of federal law to the Section 29(b) claims in this case "for the same reasons outlined in *Data Access*", *Ibid.*, and upheld the district court's dismissal of the petitioners' amended complaint.

## REASONS FOR GRANTING THE WRIT

### I. Conflicts Between The Circuits As To The Limitations Period To Be Applied To Rule 10b-5 Actions Created By The *Data Access* Ruling Warrant Resolution By This Court.

The classical ground for granting certiorari is a conflict between circuit courts on a substantive issue of federal law. Supreme Court Rule 17. The question of whether federal courts should apply a one year/three year limitations period to Rule 10b-5 actions or to apply longer analogous limitations periods based on applicable state law is certainly one that falls within the conflict between circuits category. At this writing, only two circuit courts have considered *Data Access* and both have rejected its application to Rule 10b-5 cases. *See Raney & Co. v. Goren*, 875 F.2d 1218 (6th Cir. 1989); *Durham v. Business Management Associates*, 847 F.2d 1505 (11th Cir. 1988).

On the other hand, the district courts throughout the country are being asked by defendants to reconsider longer Rule 10b-5 limitations periods on the basis of *Data Access*. *See Bath v. Bushem, Gaines, Gaines and Jonas*, 695 F.Supp. 1156 (D. Wyo. 1988); *Marchese v. Nelson*, 700 F.Supp. 522 (D. Utah, 1988); *Kayne v. Painewebber, Inc.*, 703 F.Supp. 1334 (N.D. Ill. 1989); *In re Professional Financial Management, Ltd.*, 703 F.Supp. 1388 (D. Minn. 1989); *Metropolitan Securities v. Occidental Petroleum*, 705 F.Supp. 134 (S.D.N.Y. 1989). While only the court in *Bath* explicitly adopted the *Data Access* one year/three year limitations period, 695 F.Supp. at 1162, the court in *Kayne* found the reasoning of the Third Circuit "compelling," 703 F.Supp. at 1343, although it declined to apply the new judicially determined limitations period retroactively. *Ibid.*

The uncertainty the *Data Access* ruling has created as to what is the applicable limitations period for actions brought under Rule 10b-5, a primary ground for invoking the express rescission remedy in Section 29(b), warrants an allocation of this Court's limited but vital resources. If allowed to fester without being lanced in an opinion of this Court, the boil of the *Data Access* one year/three year ruling will seriously impede the prophylactic use of implied Rule 10b-5 actions and the express Section 29(b) remedy of recission as a deterrent to securities fraud.[1]

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[1] As duly noted by one commentator, most circuit courts initially looked to statutes of limitations for common law fraud actions as appropriate limitations periods for Rule 10b-5 actions. Then a trend began to apply state securities law limitation periods with the result that, prior to *Data Access*, nine circuit courts had applied Blue Sky statute bars, leaving only the Ninth and Tenth Circuits applying the general fraud limitations period. Bloomenthal, "The Statute of Limitations and Rule 10b-5 Claims; A Study in Judicial Lassitude," 60 *Colorado Law Review* 235, 240 (1989) (hereinafter "Bloomenthal, *Judicial Lassitude*"). The conflict between circuit courts as to the appropriate analogous state statute of limitations identified in Professor Bloomenthal's article prior to *Data Access* by itself merits review by this Court.

**II. The *Data Access* Ruling Constitutes A Sharp Break With Precedent Of This Court Differentiating Rule 10b-5 Actions From Those Brought Under Sections 11 And 12 Of The Securities Act.**

If this Court grants review of the question posed by this petition, "it will not write on a wholly clean slate." Bloomenthal, *Judicial Lassitude*, 60 *Colorado Law Review* 235, 270 (1989).[2] In *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), an implied action under Rule 10b-5 was distinguished from express actions under Sections 11 and 12 of the Securities Act of 1933, 15 U.S.C. §§ 77k and 77l, in part on the ground that these express special remedies for securities fraud, which do not require proof of reliance or scienter, have a shorter statute of limitations than do Rule 10b-5 actions. This Court's view was made explicit in a footnote to the majority opinion authored by Justice Powell: "Since no statute of limitations is provided for civil actions under [Section] 10(b), the law of limitations of the forum state is followed as in other cases of judicially applied remedies." 425 U.S. at 210, n. 29.

Only five years ago, the essential holding in *Hochfelder* — that the plaintiff has to prove scienter to establish a claim under Section 10(b) of the Exchange Act and Rule 10b-5 — was held to justify implying a private right of action under the Rule not subject to procedural provisions such as the one year/three year limitations period for express strict liability causes of action found in sections 11 and 12 of the Securities Act. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 384-385 (1983). In the course of contrasting the procedural differences between the civil liability provisions

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[2] While the petitioners have drawn extensively on the research performed by Professor Bloomenthal, the conclusion reached in his article that the one year/three year limitation period should be applied to all Rule 10b-5 actions so as to achieve an ingenuous uniformity between circuit courts rather than to comport with the remedial purpose of the Exchange Act is diametrically opposite to the relief sought by way of this petition.

of the Securities Act and implied right of action under Section 10(b) of the Exchange Act, Justice Marshall declared in *Huddleston* that, with respect to Rule 10b-5 actions, "courts look to the most analogous statute of limitations of the forum state, which is usually longer than the period provided for in section 11 actions." 459 U.S. at 384, n. 18.

It is difficult to comprehend how the Third Circuit could ignore precedent such as that so clearly expressed by this Court in *Hochfelder* and *Huddleston*. Thus, under the doctrine of *stare decisis*, a conflict with governing precedent expressed in leading Rule 10b-5 decisions of this Court provides yet another reason for granting review of the *Data Access* ruling through the vehicle of this case.

**III. The *Data Access* Ruling Has Adverse Policy Implications In That It Will Necessarily Increase The Volume Of RICO Claims.**

Considerable irony attaches to the fact that the decision in *Data Access*, by restricting the scope of actions under Rule 10b-5 and Section 29(b), is predicated upon the reasoning of this Court in *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143 (1987). The ultimate holdings in *Malley-Duff* are that (1) claims under the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. § 1961 *et seq.*, ("RICO") are to be governed by a uniform four year limitations period based on its analogy to the remedy provided for conspiracies under the federal antitrust laws, 483 U.S. at 150-154, and (2) "Application of a uniform federal limitations period [for RICO] avoids the possibility of the application of unduly short state statutes of limitations that would thwart the legislative purpose of creating an effective remedy." 483 U.S. at 154.

In this case, as in *Data Access*, the quixotic quest for a uniform federal limitations period to be applied to actions brought under Rule 10b-5 and Section 29(b) of the Exchange Act has resulted in a very short statute of limitations for

securities fraud claims as much as three years less than that applied to RICO actions. This result thwarts the judicial purpose in allowing a private remedy for violations of the Rule and the congressional purpose in providing a rescissional remedy for fraud in securities contracts. *See Huddleston*, 459 U.S. at 390 ("The interests of defendants in a securities case do not differ qualitatively from the interests of defendants sued for violations of other federal statutes such as the antitrust or civil rights laws . . . ")

Among the predicate acts which give rise to a RICO claim are violations of the federal securities laws such as Section 10(b) and Rule 10b-5. 18 U.S.C. §1961(1). The material and inevitable result of the *Data Access* ruling — particularly if followed by other circuit courts — will be to convert many garden variety securities fraud claims into RICO actions when there is any question of a limitations bar. There is no other path left for a vigorous plaintiff's attorney.

This Court has at least on two occasions expressed concerns with the broad scope of RICO in civil actions suggesting it is a "poorly drafted statute" that should be rewritten by Congress. *H.J. Inc. v. Northwestern Bell*, 106 L.Ed.2d 195, 214 (1989); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499-500 (1985). The spectre of a strict one year discovery/three year absolute bar limitations period for Rule 10b-5 actions, however, is not the type of ruling that would encourage Congress to narrow the scope of civil actions under RICO. To the contrary, the *Data Access* ruling provides a strong argument for continuing to maintain broad RICO civil liability provisions because of that statute's longer four year statute of limitations as well as the possibility, one foreclosed by the three year absolute bar for Rule 10b-5 actions applied in this case, that the limitations period for RICO claims could be tolled in appropriate circumstances. *See Malley-Duff, supra*, 483 U.S. at 156-157; *see also Gaus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, 234-235 (1959) (applying equitable tolling principles to suit under Federal Employees Liability Act, 45

U.S.C. § 31 *et seq.*, providing for a three year limitations period in which to bring suit.)

**IV. The Court Below Ignored Congressional Intent When It Applied The *Data Access* Ruling To Exchange Act Section 29(b) Actions.**

Section 29(b) of the Exchange Act does contain a one year/three year limitations bar — but one expressly limited to contracts involving broker-dealers. Otherwise an analysis of the plain language of the Exchange Act shows a clear congressional intent that the limitations period applicable to this express remedy for fraud in the making or performance of contracts should be the same as that applied generally to state contract actions.

"[T]he starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975). Section 29(b) initially provides that:

> Every contract made in violation of any provisions of [the Exchange Act] or of any rule or regulation thereunder, and every contract . . . the performance of which involved the violation of . . . any provisions of this title or any rule or regulation thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule or regulation, shall have made or engaged in the performance of any such contract.

The second part of the statute constitutes a *proviso* listing the exceptions and limitations to its scope determined by Congress and declares in pertinent part:

> (A) *That no contract shall be void* by reason of this subsection because of any violation of any rule or regulation prescribed pursuant to paragraphs (2) or (3) of subsection (c) of Section 15 of this Title [15 U.S.C. § 78o(c) (2) and (3)] and (B) that no contract shall be

> deemed to be void by reason of this subsection *in any action maintained in reliance upon this subsection, by any person to or from whom any broker or dealer sells,* or from or for whom any broker or dealer purchases a security in violation of any rule or regulation prescribed pursuant to paragraph (1) of subsection (c) of section 15 of this title, [15 U.S.C. § 78o(c)(1)], *unless such action is brought within one year after the discovery that such sale or purchase involves such violation and within three years after such violation.* (Emphasis added.)

The intent of Congress is made crystal clear by the above cited *proviso* which declares that the one year/three year limitations period adopted in *Data Access* for Rule 10b-5 actions is only applicable to actions "maintained in reliance upon" Section 29(b) when the securities in question were purchased from a broker or dealer in violation of paragraphs (1), (2) or (3) of subsection 15(c) of the Exchange Act, 15 U.S.C. § 78o (c)(1), (2),(3). If Congress had intended Section 29(b) actions to be limited to the one year/three year limitations period specified for certain Section 15(c) actions against broker-dealers set forth in the *proviso,* it knew how to do so. *Touche Ross & Co. v. Redington,* 442 U.S. 560, 579 (1979). The fact that it chose not to further limit the scope of Section 29(b) points to a congressional intent that analogous state statutes of limitations would be applied to all other contracts tainted by securities fraud in their making and/or performance.[3]

The language of Section 28(a) further supports the very construction of Section 29(b) contended for by the petitioners — that the latter remedial provision of the Exchange Act

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[3] Prior to *Data Access,* there was substantial authority for the proposition that the one year/three year limitations bar included in Section 29(b) only applies to violations by broker-dealers of certain subparagraphs of Section 15(c) of the Exchange Act. *See Livingston v. Weis, Voisin, Cannon, Inc.,* 294 F. Supp. 676 (D.N.J. 1968); *see also Pearlstein v. Scudder & German,* 295 F. Supp. 1197 (S.D.N.Y. 1968), *reversed on other grounds,* 429 F.2d 1136 (2nd Cir. 1970), *cert. denied,* 401 U.S. 1013 (1971).

should be construed *in pari materia* with state statutes of limitations for common law contract remedies:

> The rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity . . .

15 U.S.C. § 78bb(a).

Under established conflict of laws principles, it has been long accepted that where the federally created right has no express limitations period, the law to be applied, including statutes of limitations, is the state "where the crucial combination of events transpired." *Cope v. Anderson*, 351 U.S. 461, 466 (1947). When confronted with a contract action, a federal court ordinarily looks to the laws of the state where the contract was made to determine the limitations period, if any, which may bar the plaintiff's right to recover. *Guaranty Trust Co. v. York*, 326 U.S. 99, 109-112 (1945).

Consistent with the concept that fraudfeasors may not gain an advantage by concealing facts on which a fraud in the making or performance Section 29(b) claim may be asserted, the generally longer period in which plaintiffs have to bring common law actions for rescission of securities contracts do not begin until such time as the cause of action for fraud accrues. *See e.g.*, N.Y.C.P.L.R. § 203; N.J.S.A. 2A:14-1; *E.O. Painter Fertilizer Co. v. Kil-Tone Co.*, 105 N.J.L. 109, 143 A. 332 (E. & A. 1928); *see also Gaus v. Brooklyn Eastern District Terminal, supra.*

**V. Longer State Analogous Limitations Periods Should Be Applied to Rule 10b-5 and Section 29(b) Actions.**

The policy considerations that underlie the decision in *Data Access*, and that of the court below to actions under Section 29(b), is the desire for a uniform federal statute of limitations that could discourage forum shopping and motion practice at the district court level. Bloomenthal, *Judicial Lassitude*, 60 Colorado Law Review at 265. But, as previously

stated, the decision in *Data Access*, far from offering uncontroverted guidance, is presently causing considerable procedural litigation before district courts. *See* Point I, *supra*.

The very reasoning that led to the decision in *Data Access* therefore justifies review and a decision by this Court to establish a uniform limitations period for both Rule 10b-5 and Section 29(b) actions. Such a ruling would be consistent with this Court's recent decision in *Reed v. United Transportation Union*, 102 L.Ed.2d 665 (1989). In *Reed*, this Court found that the appropriate statute of limitations for an infringement of First Amendment rights alleged to violate Section 101(a)(2) of the Labor-Management Disclosure Act of 1959, 29 U.S.C. § 411(a)(2), is the analogous state personal injury limitations period. As stated by Justice Brennan:

> Since § 101(a)(2) has evident similarities to § 1983, which prohibits the infringement of First Amendment rights by persons acting under color of state law, it is apparent that § 101(a)(2) actions also are analogous to state personal injury claims, and under our usual borrowing rule would take their statutes of limitations. Moreover, these state personal injury statutes are of sufficient length [citation omitted] to accommodate the practical difficulties faced by § 101(a)(2) plaintiffs, which include identifying the injury, deciding in the first place to bring suit against and thereby antagonize union leadership, and finding an attorney. *See Doty v. Sewall*, 784 F.2d 1, 9 (Cal. 1986).

The reasoning provided by this Court for choosing a longer analogous limitations period in *Reed* than the six month period advocated by the defendant union based on the decision of *DelCostello v. Teamsters*, 462 U.S. 151 (1983), patently is applicable to Rule 10b-5 and Section 29(b) actions. Persons who are victimized by securities fraud also have difficulty in identifying the injury, deciding to bring suit and thus often antagonizing close business associates (and

sometimes friends) such as their personal investment advisers, brokers, accountants, or attorneys, and finding an independent attorney with specialized knowledge in the arcane field of securities law to bring suit.

In addition, where there is concealment of fraudulent conduct that would vitiate a contract, under traditional equitable concepts previously applied to Rule 10b-5 actions before *Data Access*, the limitations period is tolled until the plaintiff discovers facts on which he can predicate an appropriate claim of rescission based on fraud. *See Holmberg v. Armbrecht, 327 U.S. 392 (1946); Biggans v. Bache Halsey Stewart Shields, Inc.*, 638 F.2d 605 (3rd Cir. 1980); *Cook v. Avien, Inc.*, 573 F.2d 685 (1st Cir. 1978).

Adoption of state contract limitations periods as a uniform statute of limitations for Rule 10b-5 and Section 29(b) actions, based on the logic applied in *Reed*, generally will provide a longer time to bring suit for federal securities claims consistent with the general expectation of persons who enter into contracts for the purchase or sale of securities.[4]

Alternatively, this Court may decide to implement a two-tier limitations bar for actions under Rule 10b-5 and Section 29(b). Adoption by many federal courts of the limitations provisions made part of state uniform securities laws is inconsistent with the concept that Section 10(b) of the Exchange Act is a "catchall" clause and that what it catches is fraud. *See Hochfelder, supra*, 425 U.S. at 202-203. By way of contrast, with a few exceptions, state Blue Sky laws are modeled after the Securities Act and do not require that the plaintiff investor establish scienter as an element of proof

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[4] The limitations period for contracts not involving the sale of goods in most states including New York (N.Y.C.P.L.R. § 213) and New Jersey (N.J.S.A. 2A:14-1) is six years and five years in Florida (Fla. Stat. § 95.11(2)). These are the three states with the closest nexus to the securities transactions complained of by the petitioners. In all three states the limitations period runs from the time the contract cause of action accrues.

required to rescind a securities contract. *See* Uniform Securities Act § 410(a)(2), 7B U.L.A. 643 (1985). It follows that, as an alternative to uniformly adopting analogous state contract limitation periods for both Rule 10b-5 and Section 29(b) action, the next closest analogy to the acts prohibited by Section 10(b) of the Exchange Act is the limitations period for common law fraud claims.[5]

With respect to actions brought under the express provisions of Section 29(b), the most analogous state limitations period is patently that for contract claims. This is because that statute "establishes that the guilty party is precluded from enforcing the contract against an unwilling innocent party . . . " *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 386-387 (1970); *Tcherepnin v. Knight*, 389 U.S. 332, 333 (1967). Thus, if a two-tier statute of limitations system is to be utilized by this Court, it should determine that Rule 10b-5 actions are governed by analogous state common law fraud limitations periods and Section 29(b) actions by analogous state contract limitations periods.

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[5] The absolute bar limitations periods for common law fraud actions in New York, New Jersey and Florida all are six years or more: New York, N.Y.C.P.L.R. § 203(f) (two years from the date the fraud should have been discovered or six years from the last fraudulent act); New Jersey, N.J.S.A. 2A:14-1 (six years from the time the fraud cause of action accrues); and Florida, Fla. Stat. §§ 95.031 and 95.11[3] (four years from discovery of the fraud and absolutely barred if not commenced within 12 years of the commission of the alleged fraud).

## CONCLUSION

Based on the foregoing, this Court should grant *certiorari* to address the substantial statute of limitations issue presented by the decision of the Third Circuit Court of Appeals in this case and in *Data Access*.

DATED: December 21, 1989

Respectfully submitted,

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**APPENDIX A**

Filed: August 24, 1989

**UNITED STATES COURT OF APPEALS**
**FOR THE THIRD CIRCUIT**

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No. 89-5206

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MICHAEL GATTO, RICHARD GATTO, STANFORD J. HELLER, LAURENCE KRAMER, RALPH NAPPI, NAT SORKIN, SAM ZUCKERMAN, SANDY ZUCKERMAN, HYMAN SILKES, LEFF & WOLF CO., a New York unincorporated association, and O. GEORGE PHILIPP,

*Appellants*

v.

MERIDIAN MEDICAL ASSOCIATES, INC., 1680 MERIDIAN CORP., MAST PROPERTY INVESTORS, INC., CONSOLIDATED MAST CORPORATION, MAST PROPERTY INVESTORS, INC. and AFFILIATED COMPANIES EMPLOYEE PROFIT SHARING TRUST, NWN CAPITAL LTD., MARKS, SHRON & COMPANY, NORMAN W. NICK, MARVIN E. GREENFIELD, GERALD SILVERMAN, JOHN DOE and RICHARD ROE INC.

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On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 87-5076)

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Submitted Under Third Circuit Rule 12(6)
August 10, 1989

Before: SLOVITER and GREENBERG,
*Circuit Judges*, and
VAN ANTWERPEN, *District Judge*[*]

(Filed August 24, 1989)

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## OPINION OF THE COURT

SLOVITER, *Circuit Judge.*

### I.

Appellants are plaintiffs in a suit alleging violations of federal securities laws and state common law in connection with their purchase on or about December 30, 1981 of limited partnership interests in a medical building, a transaction structured to shelter income from federal taxation. Appellees were various parties connected with the sale of the limited partnership interests. Meridian Medical Associates, Inc. (MMA) was the issuer of the securities; 1680 Meridian Corp. was a corporation organized to obtain a lease on the office building; Consolidated Mast Corporation was the sole shareholder of MMA; Mast Property Investors, Inc. and Affiliated Companies Employee Profit Sharing Trust provided financing; NWN Capital Ltd. was the broker-dealer which sold the securities; and Marks, Shron & Co. was an accounting partnership which prepared financial projections used in the

offering. The individual defendants were principal shareholders and/or control persons of the various corporate defendants.

Appellants filed suit in federal court on December 28, 1987 after learning that the Internal Revenue Service had disallowed the tax deductions which formed the *raison d'etre* of their investments. Appellants' federal claim was based on allegations that they were induced to purchase the limited partnership interests by fraudulent misrepresentations and omissions constituting violations of section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), (1982), and Rule 10b-5, 17 C.F.R. § 240.10b-5 (1988). Appellants contended that these violations gave them a right under section 29(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78cc(b) (1982), to rescind the limited partnership agreements. Appellants also included various state law claims.

The district court granted defendants' motions to dismiss on the ground that the federal cause of action was barred by the statute of limitations. The court, applying the rule announced by this court in *In re Data Access Sys. Sec. Litig.*, 843 F.2d 1537 (3d Cir.) (*in banc*), *cert. denied*, 109 S. Ct. 131 (1988), held that the appellants were required to file suit within one year from the time of discovery and within three years from the time the violation occurred. The district court also found that the *Data Access* rule applied retroactively and dismissed the amended complaint, including the pendent state law claims.

## II.

Appellants contend that the district court erred in applying the limitations period for section 10(b) and Rule 10b-5 violations to their claim under section 29(b), and, alternatively, that if *Data Access* does apply to claims under section 29(b) it should not apply retroactively in this case.

Section 29(b) provides in pertinent part that:

> Every contract made *in violation of any provision of this chapter or of any rule* or regulation thereunder, and every contract . . . heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this chapter or any rule or regulation thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, or regulation, shall have made or engaged in the performance of any such contract.

15 U.S.C. § 78cc(b) (1982) (emphasis added).

Appellants claim that the applicable limitations period for claims under section 29(b), other than claims against brokers or dealers under section 15(c)(1) of the Securities Exchange Act, 15 U.S.C. § 78o(c)(1), is the statute of limitations governing the rescission of contracts in the state in which the contract was made. They contend that the six year New York state limitations period for contract actions applies because rescission is a traditional contract remedy, and that therefore their complaint was timely.[1]

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[1] Appellants would apply New York law because the security agreements executed in connection with their assignment of the limited partnership interests provided that they were to be governed and construed in accordance with New York contract law. The district court held that these agreements were not at issue in the law suit and, furthermore, that such a provision, even if applicable, would merely govern the choice of substantive law to be applied to the security agreement and would not govern the choice of the statute of limitations. *See* Federal Deposit Ins. Corp. v. Petersen, 770 F.2d 141, 142-43 (10th Cir. 1985); Des Brisay v. Goldfield Corp., 637 F.2d 680, 682 (9th Cir. 1981). In light of our decision that we must look to federal law, we need not reach this issue.

There appears to be no precedent covering precisely the issue before us.[2] It is evident, however, that appellants' federal claim is not based on any contract violations but on allegations of fraudulent inducement. Thus the argument that state contract limitations periods apply to suits seeking relief under section 29(b) is unpersuasive.

Instead we must determine under federal law the applicable statute of limitations for a suit seeking a section 29(b) remedy. We note that Section 29(b) does itself contain a statute of limitations governing certain limited situations. Suits against brokers or dealers based on violations of section 15(c)(1) must be brought "within one year after the discovery that such sale or purchase involves such violation and within three years after such violation." 15 U.S.C. § 78cc(b). This provision is inapplicable here because the appellants' suit is not seeking rescission of a transaction for violation of section 15(c)(1) of the statute which prohibits use of manipulative, deceptive, or fraudulent devices by brokers or dealers.

Our holding in *Data Access* counsels that judicially identified limitations periods for federal securities law violations are to be selected by reference to analogous areas of federal securities law. *See Data Access,* 843 F.2d at 1545-49. We relied on three Supreme Court cases opting for a uniform limitation period under other statutes, *see Agency Holding Corp.* v. *Malley-Duff & Assocs.*, 483 U.S. 143 (1987) (civil RICO); *DelCostello* v. *International Bhd. of Teamsters*, 462 U.S. 151 (1983) (suits for violation of collective bargaining agreement, 29 U.S.C. § 185); *cf. Wilson* v. *Garcia*, 471 U.S. 261 (1985) (applying uniform state statute for civil rights suits under 42 U.S.C. § 1983), to support application of a uniform federal statute of limitations in cases involving securities claims. Then, in selecting the appropriate statute of

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[2] A district court in dictum has suggested that in actions under section 29(b) we must look to whether a claim on the underlying violation would be barred. *See* Gilbert v. Meyer, 362 F. Supp. 168, 176-77 (S.D.N.Y. 1973).

limitations we noted that Congress used a clear pattern within the provisions of the Securities Exchange Act to require suit to be brought within one year of discovery and within three years after the occurrence of the violation. 843 F.2d at 1545-46.[3] Thus, even if we were to conclude that the limitations period for the underlying section 10(b) and Rule 10b-5 violations does not govern a suit under section 29(b), we would adopt the one year/three year limitations period as matter of federal law for the same reasons outlined in *Data Access*.

## III.

Appellants argue next that even if *Data Access* applies, it should not apply retroactively.[4] When we directly confronted that issue in *Hill* v. *Equitable Trust Co.*, 851 F.2d 691 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 791 (1989), we upheld retrospective application of the *Data Access* rule. Of course, it does not follow that this is necessarily the result in all cases. Instead we must apply the three criteria set forth by the Supreme Court in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-07 (1971), which govern when a decision will apply prospectively only. Those criteria are:

> (1) The holding must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed;

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[3] We noted that most of the express causes of action under the 1934 Act have this statute of limitations, with the exception of section 16(b), 15 U.S.C. § 78p(b), which has a two year absolute limitation. *Data Access*, 843 F.2d at 1545-46.

[4] Often overlooked is the fact that the majority in *Data Access* in effect applied the result retroactively, which is evident because it was disagreement with that silent portion of the holding which prompted the dissent. *See* 843 F.2d at 1551, 1553 (Seitz, J., dissenting).

(2) The merits and demerits in each case must be weighed by looking to the history of the rule in dispute, its purpose and effect, and whether retrospective operation will further or retard the rule's operation;

(3) Retrospective application must create the risk of producing substantially inequitable results.

*Hill*, 841 F.2d at 696.

As to the first criterion, appellants claim that *Data Access* overruled clear past precedent. They argue that this court's prior decisions in *Biggans* v. *Bache Halsey Stuart Shields, Inc.*, 638 F.2d 605 (3d Cir. 1980), and *Roberts* v. *Magnetic Metals Co.*, 611 F.2d 450 (3d Cir. 1979), clearly established that the applicable limitations period for Rule 10b-5 actions was to be determined by looking to the state securities laws and, if the state's blue sky law did not provide a civil remedy and a statute of limitations, to the state statute of limitations for common law fraud. The *Hill* court, however, found that those opinions written by sharply divided panels did not establish clear precedent, and that *Data Access* did not resolve an issue of first impression. *Hill*, 851 F.2d at 697-98. Appellants have pointed to no circumstances (*i.e.*, any other circuit precedent regarding limitations for 10b-5 violations under New Jersey law) which would justify our deviation from the *Hill* court's legal conclusion on this issue.

Even more important here is the fact that the first *Chevron* factor looks to justifiable reliance. *See Smith* v. City of Pittsburgh, 764 F.2d 188, 195 (3d Cir.), *cert. denied*, 474 U.S. 950 (1985). Because appellants did not know the significant operative facts underlying their cause of action, particularly that the IRS would disallow the deductions, until after the three year absolute bar period of *Data Access* had passed, they could not possibly have relied on a longer statute of limitations period. Thus the first of the *Chevron* criteria is not met here.

As to the second criterion, appellants argue that retrospective application of *Data Access* will deprive them of a remedy. This argument is really an argument that retrospective application is inequitable and is properly considered in connection with the third criterion. Although there is an interest in uniformity which always militates in favor of retrospective application, there has been nothing presented by either appellants or appellees to undermine the *Hill* court's conclusion that "resolution of the second *Chevron* criteria . . . is neutral." *Hill,* 851 F.2d at 698.

Resolution of the third criterion, however, cannot be answered solely by reference to *Hill.* In *Hill,* the court found that it was not inequitable to apply *Data Access* retroactively because the plaintiffs' suit would have been barred under the applicable state statute of limitations. *Id.* Appellants argue that under the applicable New York statute of limitations, their action would have been timely.

Contrary to appellants' assertions, however, under the precedent applicable at the time this suit was filed, the district court was obligated to look to the law of the forum state in order to determine the most analogous limitations period, *see Roberts* v. *Magnetic Metals Co.,* 611 F.2d 450, 452 (3d Cir. 1979), and a fair reading of our precedent would suggest that appellants should have been on notice that the New Jersey blue sky law with its two year limitations period for suits by buyers against sellers of securities might have been applicable. *See id.* at 453; *Data Access,* 843 F.2d at 1554 (Seitz, J., dissenting). Appellants point to no precedent which would have justified their belief that a contract period of limitations was relevant. In any event, as we noted in *Fitzgerald* v. *Larson,* 769 F.2d 160, 164 (3d Cir. 1985), the third *Chevron* factor in practice overlaps with that of the first factor, "in that it would be inequitable to give retrospective application to a shortening of the limitations period that altered established law upon which plaintiff could have reasonably relied." Since, as we noted above, plaintiffs could not have reasonably

relied on any applicable precedent, the type of equity that is relevant for the retrospective application issue is not present in this case. We hold, therefore, that the *Chevron* factors do not preclude retrospective application of the *Data Access* rule.

## IV.

In sum, we have held that when plaintiffs sue under section 29(b) of the Securities Exchange Act for rescission of a transaction alleging that the transaction violated section 10(b) or Rule 10b-5, they must do so within one year of their discovery of the facts underlying their claim and, in any event, no longer than three years from the transaction itself. We have further held that in this case there is no bar to the usual rule applying a legal decision retrospectively. For the foregoing reasons the judgment of the district court will be affirmed.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals*
*for the Third Circuit*

## APPENDIX B

**NOT FOR PUBLICATION**

**United States District Court**
**District Of New Jersey**

MICHAEL GATTO, RICHARD GATTO, STANFORD J. HELLER, LAURENCE KRAMER, RALPH NAPPI, NAT SORKIN, SAM ZUCKERMAN, SANDY ZUCKERMAN, HYMAN SILKES, LEFF & WOLF CO., a New York unincorporated association, and O. GEORGE PHILIPP,

*Plaintiffs,*

v.

MERIDIAN MEDICAL ASSOCIATES INC., 1680 MERIDIAN CORP., MAST PROPERTY INVESTORS, INC., CONSOLIDATED MAST CORPORATION, MAST PROPERTY INVESTORS, INC. AND AFFILIATED COMPANIES EMPLOYEE PROFIT SHARING TRUST, NWN CAPITAL, LTD., MARKS, SHRON & CO., NORMAN W. NICK, MARVIN E. GREENFIELD, GERALD SILVERMAN, JOHN DOE and RICHARD ROE, INC.,

*Defendants.*

Civil Action
No. 87-5076 (JCL)

OPINION
(Filed Feb. 9, 1989)

LIFLAND, District Judge.

This is a case alleging federal securities and state law causes of action. Defendants filed motions to dismiss, or in the alternative to transfer the case pursuant to 28 U.S.C. § 1404(a). On December 22, 1988 the court entered an order denying defendants' motion to transfer the case to either the Southern District of New York or to the Southern District of Florida. The court resolves the motions to dismiss on the papers pursuant to F. R. Civ. P. 78.

**Background**

The original complaint was filed on December 18, 1987. The first amended complaint [hereinafter "Amended Complaint"], which added certain plaintiffs to the case, was filed on February 29, 1988. Plaintiffs are investors who purchased limited partnerships in a Florida medical building before the closing date of December 31, 1981.[1] Amended Complaint at ¶19. The Internal Revenue Service [hereinafter "IRS"] did not accept plaintiffs' federal income deductions based on plaintiffs' ownership of the limited partnerships, determining that the value of the building was overstated. Plaintiffs are suing the parties responsible for determining the value of the building and selling the limited partnerships.

The defendants are: (1) Meridian Medical Associates, Inc. [hereinafter MMA], a Florida corporation whose principal place of business is in New York;

(2) Meridian Associates, Ltd., a Florida limited partnership. MMA was incorporated to be the general partner for this partnership, and as such sold securities in the form of limited partnerships to the plaintiffs in this case;

---

[1] Plaintiff Leff & Wolf Company is an unincorporated association that invested in the Florida medical building. No further description of Leff & Wolf is given in the Amended Complaint.

(3) 1680 Meridian Corp., a Florida corporation organized to obtain a net operating lease with an option to purchase the Meridian Medical Office Building. This is the medical building in question, and it is the sole asset of the limited partnership;

(4) Consolidated Mast Corp., a New York corporation that is the sole shareholder of MMA, which issued the limited partnerships. Consolidated Mast Corp. is alleged to be a control person of the issuer of securities under 15 U.S.C. § 78t(a). Plaintiffs also allege that Consolidated Mast is an affiliated corporation with Meridian Associates, Ltd.;

(5) Mast Property Investors, Inc. and Affiliated Companies Employee Profit Sharing Trust [hereinafter Mast], a New York business trust that provided financing for the medical office to Meridian Associates, Ltd. through a wraparound mortgage of $3.2 million;

(6) NWN Capital, Ltd., a broker-dealer employed by MMA to sell the securities;

(7) Marks, Shron & Co. [hereinafter Marks, Shron], a New York accounting partnership which prepared projections that were made part of a Preliminary Confidential Memorandum [hereinafter "PCM"], the document that described the offering of the limited partnership units to the plaintiffs and other investors;

(8) Norman W. Nick and Marvin E. Greenfield, principal shareholders and/or control persons of Consolidated Mast, MMA, Meridian Associates, and Mast; and

(9) Gerald Silverman, a principal shareholder and/or control person of 1680 Meridian Corp.

The complaint alleges that plaintiffs were "from October 1981 and continuing until the present," Amended Complaint

at § 24, fraudulently induced into purchasing the limited partnerships by the following alleged material misrepresentations and omissions in the PCM:

> (1) That MMA has been structured as an "abusive tax shelter" due to an untrue or recklessly unrealistic appraisal of the building;
>
> (2) That defendants Nick and Greenfield, the principal officers and directors of MMA, had, prior to the issuance of the PCM, entered into a consent order with the New York Attorney General regarding their failure to disclose that two limited partnerships under their control had filed for bankruptcy. Under the consent order the limited partners were offered rescission of the limited partnerships; and
>
> (3) That the PCM failed to disclose that defendant Greenfield filed for personal bankruptcy on December 5, 1977 due to his inability to meet his personal guarantee to real estate construction projects.

Plaintiffs claim that this scheme was furthered by a formal private offering memorandum [hereinafter "POM"] dated December 8, 1981, "which disclosed some, but not all of the above-mentioned omissions of material fact. The 12/8/81 POM was not distributed to plaintiffs prior to their investment in [MMA]." Amended Complaint at § 29. The Amended Complaint alleges at ¶28 that Marks, Shron aided and abetted the other defendants by misrepresenting the fair market value of the medical building at $4.2 million. As of April 3, 1985 the IRS valued the building at $2.3 million, a figure substantially lower than the price the plaintiffs paid for the limited partnerships. As a result plaintiffs' tax deductions were disallowed; the Amended Complaint alleges, however, that the disallowance was not known to plaintiffs until June 1987. Finally, plaintiffs claim that defendant Silverman, with knowledge of the allegedly fraudulent scheme, effectuated the

lease between 1680 Meridian Corporation and MMA on September 1, 1986.

The first cause of action, which is the only federal cause of action in the Amended Complaint, asserts that the alleged fraudulent misrepresentations and omissions constitute a violation of Rule 10b-5, 17 C.F.R. § 240.10b-5, and Section 10(b) of the 1934 Securities Exchange Act, 15 U.S.C. § 78j(b). The second cause of action asserts common law misrepresentation, fraud, and conspiracy. The third cause of action asserts a breach of fiduciary duty by MMA, Nick, and Greenfield. The fourth cause of action sounds in negligence against Marks Shron. Plaintiffs seek rescission of their limited partnership interests, compensatory and punitive damages, and costs.

Defendants seek to dismiss the Amended Complaint on the following grounds: (1) the Amended Complaint is barred by the applicable statute of limitations; (2) The Amended Complaint does not plead fraud with particularity pursuant to F. R. Civ. P. 9(b); and (3) the Amended Complaint does not state a claim against the defendants. The court need not reach the second and third grounds for dismissal offered by defendants, nor will the court consider whether the second, third, and fourth causes of action are time-barred. The court holds that the federal securities cause of action in the Amended Complaint is time-barred, and that the Amended Complaint must accordingly be dismissed for want of federal jurisdiction.

**Discussion**

In *In re Data Access Systems Securities Litigation*, 843 F.2d 1537 (3d Cir. 1988), the Third Circuit held that "the proper period of limitations for a complaint charging violation of section 10(b) and Rule 10b-5 is one year after the plaintiff discovers the facts constituting the violation, and in no event more than three years after such violation." *Id.* at

1550. In *Hill* v. *Equitable Trust Co.*, 851 F.2d 691 (3d Cir. 1988), the Third Circuit sitting *en banc* held that the limitations period set forth in *Data Access* would apply retroactively to a complaint filed in April 1982. The Third Circuit noted that *Data Access* received conflicting Third Circuit opinions, and that the plaintiffs in *Hill*:

> could not have reasonably relied on any ruling of this court setting out the appropriate section 10(b) and Rule 10b-5 statute of limitations. By the end of 1980, four judges from this court had considered the issue; two would have applied the state general fraud laws and two would have used the Blue Sky statutes. Consequently, the law in this circuit on this point could fairly be described as uncertain.

*Hill*, 851 F.2d at 691. The conflicting opinions were *Roberts* v. *Magnetic Metals Co.*, 611 F.2d 450 (3d Cir. 1979) (state general fraud limitations period applied), and *Biggans* v. *Bache Halsey Stuart Shields, Inc.*, 638 F.2d 605 (3d Cir. 1980) (state Blue Sky law limitations period applied). Both panels deciding these cases were split, and it is notable that *Data Access* adopted a third limitations period, one derived from federal law, as the appropriate limitations period. The Third Circuit considered whether *Data Access* should be applied retroactively under the three-part test set forth in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-07 (1971), and found that under this test retroactive application of *Data Access* was proper.

Since *Hill* was decided, several district courts in the Third Circuit have considered whether under the facts of their respective cases retroactive application of *Data Access* was in order. Nearly all have applied *Data Access* retroactively. *See Kursman* v. *Wright/Egan and Associates*, 1988 U.S. Dist. LEXIS 12716 (E.D. Pa. filed November 10, 1988) (complaint filed June 10, 1987); *Schwartz* v. *Philadelphia Nat'l Bank*, 1988 U.S. Dist. LEXIS 11829 (filed October 26, 1988) (complaint filed March 28, 1988); *Adelaar* v.

*Lauxmont Farms, Inc.*, 695 F. Supp. 821, 822-26 ((M.D. Pa. Sept. 16, 1988) (complaint filed January 17, 1987), *Bradford-White Corp.* v. *Ernst & Whinney*, 699 F. Supp. 1085 (E.D. Pa. September 12, 1988) (complaint filed July 14, 1983); *McCarter* v. *Mitcham*, 693 F. Supp. 349, 351-53 (W.D. Pa. Aug. 31, 1988) (complaint filed November 18, 1983); *Cohen* v. *McAllister*, 688 F.Supp. 1040, 1044-46 (W.D. Pa. June 22, 1988) (complaint filed April 15, 1987).

There are only two cases in the Third Circuit that have favored prospective application of *Data Access*. These cases, *ITG, Inc.* v. *Price Waterhouse*, 697 F. Supp. 867 (E.D. Pa. September 7, 1988), and *Gruber* v. *Price Waterhouse*, 697 F. Supp. 859 (E.D. Pa. August 26, 1988) were decided by the same district court, which relied on *Sharp* v. *Coopers & Lybrand*, 649 F.2d 175, 191-92 (3d Cir. 1981) for the appropriate limitations period because the particular facts of *Sharp* provided "clear precedent" for the plaintiffs in *Gruber*. *Gruber*, 697 F. Supp. at 862.

However, the court in *Bradford-White*, *supra*, declined to follow *Gruber* and *ITG* observing that those cases failed to take into account the Third Circuit's observation that "(c)lear holdings on which plaintiffs could rely . . . were absent in [April] 1982." *Bradford-White*, 699 F. Supp. at 1090-91 n.5 (quoting *Hill*, 851 F.2d at 697). No court has followed *Gruber* or *ITG*. This court agrees with *Bradford-White*'s reasoning, and finds, as the overwhelming majority of the district courts in the Third Circuit have, that *Hill* is to be applied retroactively. Plaintiffs have not demonstrated that they were able to rely on any Third Circuit precedent setting forth a limitations period for Rule 10b-5 actions contrary to the limitations period set forth in *Data Access*.

Retroactive application of the limitations period set forth in *Data Access* to this case time-bars plaintiffs' Rule 10b-5 cause of action, because the securities in question were purchased before December 31, 1981, while this suit was brought almost six years later.

Plaintiffs offer arguments against the application of *Data Access* to this case. The court rejects these arguments. Plaintiffs argue that they purchased the limited partnership interests in MMA by an installment sale. *See, e.g.,* Exhibit B to Affidavit of Richard Gatto. These installment sales were secured by an assignment of the limited partnership interest and a UCC financing statement. The security agreement states in relevant part:

> This Agreement shall be enforced, governed and construed in all respects in accordance with the laws applicable to contracts made and wholly performed in the State of New York.

Exhibit C to Affidavit of Laurence Kramer at 2-3, ¶7. Plaintiffs argue that under the clause the appropriate statute of limitations must be that set forth under Second Circuit, not Third Circuit, law. This argument is incorrect for two reasons. First, plaintiffs assert in the Amended Complaint that the securities, namely the limited partnership interests, violated Rule 10b-5. The security agreement financing these purchases is not at issue in this cause of action. Second, the choice of law provision in the security agreement does not dictate the choice of the statute of limitations. The Ninth Circuit, in considering this issue, stated:

> Clause 17 of the Exchange Agreement provides:
>
> This agreement shall be governed by and interpreted according to the laws of the province of British Columbia.
>
> . . . .
>
> Clause 17 of the Exchange Agreement makes no mention of statutes of limitation, but rather is a standard choice of law clause for application to the substantive interpretation of a contract. Such clauses generally do not contemplate application to

> statutes of limitation. Limitations periods are usually considered to be related to judicial administration and thus governed by the rules of local law, even if the substantive law of another jurisdiction applies. Restatement (Second) of Conflicts of Laws, § 122, comment (a). Thus, we believe the intention of the parties to contractually agree upon a limitations period should be clearly expressed before we will consider whether it is permissible to do so in a federal securities case.
>
> The rule in federal securities actions is to apply the applicable limitations period of the state in which the federal court sits. *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 210 n.29 (1976) . . . . Because there is no indication that the parties here intended to include limitations periods for ensuing federal securities actions within the scope of Clause 17 of their agreement, we hold that the District Court correctly applied the three year limitations period of the [state where the district court sat].

*Des Brisay* v. *Goldfield Corp.*, 637 F.2d 680, 682 (9th Cir. 1981). *Accord, Federal Deposit Ins. Corp.* v. *Petersen*, 770 F.2d 141, 142 (10th Cir. 1985). In *Des Brisay* the applicable statute of limitations was held to be that of Washington State, the state where the action was commenced, and not that of the so-called "choice of law" clause. Since under *Data Access* the statute of limitations for Rule 10b-5 actions brought in federal courts in New Jersey is determined by federal law, *Des Brisay* clearly stands for the proposition that this court must follow the federal limitations period set forth in *Data Access*, rather than that of the state set forth in the choice of law clause in the security agreement.

Plaintiffs cite *Bossier Plaza Associates LP* v. *Pierson*, N.Y.L.J. Sept. 29, 1988 at 22 col. 5, for the proposition that New York law governs the choice of law of the securities in

question. The court finds that *Bossier Plaza* is inapposite because it did not address the issue of the appropriate limitations period. The court holds that plaintiffs, having chosen this forum for litigation, are bound by its statute of limitations.

Plaintiffs argue that the plaintiffs added to this case in the Amended Complaint are not time-barred because they aver that they did not have knowledge of the IRS investigation prior to December 1986. This argument is without merit, because it is the securities, not the IRS investigation, that are the object of the federal securities claim. Whatever the legal impact of plaintiffs' lack of knowledge of the IRS investigation may be, it does not under *Data Access* and *Hill* toll the absolute three-year limitations period. Therefore, the court holds that the plaintiffs added in the Amended Complaint are time-barred from filing suit under Rule 10b-5.[2]

For these reasons, the court holds that plaintiffs are time-barred from asserting a cause of action under Rule 10b-5, and this cause of action must be dismissed. Since discovery has not begun in this case, there is no persuasive reason why the court should retain its pendent jurisdiction over the state claims asserted in this action, and accordingly dismisses those claims as well. *See United Mine Workers* v. *Gibbs,* 383 U.S. 715, 726 (1966).

An order accompanies this opinion.

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[2] Plaintiffs argue that the claims of the additional plaintiffs are not time-barred because of the relation-back doctrine embodied in F. R. Civ. P. 15(c). Since the court holds that the original plaintiffs are time-barred, the relation-back argument, even if followed by this court, would not save the federal securities claims of the additional plaintiffs.

## APPENDIX C

## UNITED STATES DISTRICT COURT
## DISTRICT OF NEW JERSEY

MICHAEL GATTO, RICHARD GATTO, STANFORD J. HELLER, LAURENCE KRAMER, RALPH NAPPI, NAT SORKIN, SAM ZUCKERMAN, SANDY ZUCKERMAN, HYMAN SILKES, LEFF & WOLF CO., a New York unincorporated association, and O. GEORGE PHILIPP,

*Plaintiffs,*

v.

MERIDIAN MEDICAL ASSOCIATES INC., 1680 MERIDIAN CORP., MAST PROPERTY INVESTORS, INC., CONSOLIDATED MAST CORPORATION, MAST PROPERTY INVESTORS, INC. AND AFFILIATED COMPANIES EMPLOYEE PROFIT SHARING TRUST, NWN CAPITAL, LTD., MARKS, SHRON & CO., NORMAN W. NICK, MARVIN E. GREENFIELD, GERALD SILVERMAN, JOHN DOE and RICHARD ROE, INC.,

*Defendants.*

Civil Action
No. 87-5076 (JCL)

ORDER

Defendants move to dismiss the Amended Complaint. For the reasons set forth in the accompanying opinion,

IT IS on this 8th day of February, 1989 ORDERED that the Amended Complaint is dismissed.

John C. Lifland
United States District Judge

## APPENDIX D

## TEXT OF SECTION 10(b) OF THE 1934 ACT, 15 U.S.C. § 78j(b)

**Manipulative and deceptive devices**

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange —

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

## TEXT OF SEC RULE 10b-5, 17 C.F.R. 240.10b-5

### Employment of Manipulative and Deceptive Devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

## TEXT OF SECTION 29(b) OF THE 1934 ACT, 15 U.S.C. § 78cc(b)

### Contract provisions in violation of title

Every contract made in violation of any provisions of this title or of any rule or regulation thereunder, and every contract (including any contract for listing a security on an exchange) heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this title or any rule or regulation thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, or regulation, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule or regulation:

Provided, (A) That no contract shall be void by reason of this subsection because of any violation of any rule or regulation prescribed pursuant to paragraph (2) or (3) of subsection (c) of section 15 of this title [15 USCS § 78o(c)(2), (3)], and (B) that no contract shall be deemed to be void by reason of this subsection in any action maintained in reliance upon this subsection, by any person to or from whom any broker or dealer sells, or from or for whom any broker or dealer purchases, a security in violation of any rule or regulation prescribed pursuant to paragraph (1) of subsection (c) of section 15 of this title [15 USCS § 78o(c)(1)], unless such action is brought within one year after the discovery that such sale or purchase involves such violation and within three years after such violation.